

THE SPANISH COPYRIGHT COMMISSION (SECTION I) WITHIN THE EUROPEAN LEGAL FRAMEWORK

RAÚL RODRÍGUEZ PORRAS

ABSTRACT. Directive 2014/26/EC foresees that EU member States shall ensure that disputes between collective management societies and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in copyright law. The Spanish Copyright Commission (Section I) aims to be that body in Spain. In order to reach this objective, the Commission has been empowered with new functions that will probably reduce the existing conflicts related to copyright licensing.

1. EU REGULATION OF COPYRIGHT TARIFFS

Probably, the main aim of copyright is to provide rightholders with an adequate tool to protect their rights in order to guarantee fair and equitable prices for their creative works.

Fair and equitable prices for creative works will:

- Compensate rightholders for their efforts in creating works;
- Incentivate rightholders to create and invest in new works;
- Entice users to exploit copyright works in their economic activities, and;
- Have a positive impact in the welfare state (Public domain/source of inspiration for new works).

These assertions together with the important number of copyright disputes that have arisen in the past years in some EU member States have triggered the development of a regulation for copyright tariffs in Europe.

With respect to individual or collective rights management, the EU Directives did not generally focused on the conditions of the management of copyrights. In the case of collective management, this has changed dramatically since *Directive of the Parliament an European*

Council 2014/26 of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market came into force. One of the most innovative aspects on the collective management of rights are the obligations of transparency that collecting societies must comply with when negotiating and licensing tariffs with users.

Collective management allows rightholders, particularly those who do not dispose of sufficient bargaining power, to manage their rights efficiently. Thus, collecting societies carry out a joint social responsibility of rightholders to make sure that all of them benefit from their copyrights at a reasonable cost, irrespectively of their economic incentives to create. From the user point of view, collecting societies occupy a key position in the licensing of certain rights as they provide access to a global repertoire.

To this respect, the above-mentioned Directive 2014/26/EC lays out in its article 16 that “Licensing terms shall be based on objective and non discriminatory criteria and rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs”.

Moreover, Directive 2014/26/EC foresees that EU member States shall ensure that disputes between collective management societies and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in copyright law.

Taken into consideration what has been previously raised, EU member States must have:

- Adopted a national legislation that foresees the conditions that are set out in Directive 2014/26/CE in relation with negotiations and setting copyright tariffs, and;
- Created or appointed a dispute resolution body with expertise in copyright law that can quickly and effectively solve disputes between rightholders and users.

2. SPANISH IMPLEMENTATION OF THE EU “AQUIS” RELATED TO COYRIGHT TARIFFS

When it comes to how a EU member State, like Spain, has implemented the “EU copyright tariffs aquis”, it should be noted that the Spanish legislation did foresee a general provision in its Copyright Act related to negotiations and setting tariffs but did not count with a specific regime on these topics. The last overhaul of the Spanish Copyright Act that came into force in 2015 established a legal regime on tariffs based upon the following pillars:

- The establishment of ex-ante supervisory measures, particularly those related to the economic criteria that must be taken into account by collecting societies when setting tariffs;
- The introduction of new dispute-resolution procedures, including the setting of tariffs with regard to certain rights (mostly remuneration rights and exclusive rights related to them regarding the use of the same work or service);
- The strengthening of ex-post supervision measures to control general tariffs approved by collecting societies, and;
- The reinforcing of the First Section of the Copyright Commission legal competences. Thus, the Section has been empowered with a new tariff determination function. It is also entitled to control tariffs along with the Spanish Competition Authority and has strengthened its role as a mediator and arbitrator body.

3. MAIN CRITERIA TAKEN INTO ACCOUNT BY THE SPANISH COPYRIGHT COMMISSION TO SET TARIFFS

Collecting societies in Spain must take into consideration the minimum criteria set out in the Spanish Copyright Act when approving their general tariffs for the exploitation of the repertoire they represent. These seven minimum criteria aim to calculate the economic value of the use of the rights and are the following:

- The effective use, by the user, of the repertoire;
- The intensity and relevance of the repertoire;
- The scope of the repertoire;
- The revenue generated to the users by the commercial exploitation of the repertoire;
- The economic value of the service provided by collecting societies;
- The tariffs established by collecting societies with other users for similar economic activities, and;
- The tariffs established by other European Union collecting societies (when comparable).

Basically, the criteria could be divided into three groups:

- The first four criteria embody the price for the use of the right;
- The fifth criterion represents the price for the service provided by the collecting society, and;
- The last two criteria serve as parameters of comparison.

The said criteria have been applied by the European Court of Justice in its decisions or are foreseen in the EU Directives.¹

Moreover, the Spanish Government passed in 2015 a regulation (ECD 2574/2015) that develops a methodology to be followed by collecting societies when applying the above-referred

¹Decision of the ECJ of July 13, 1989 (*Ministère public vs. Tournier*). Decision of the ECJ of February 6, 2003 (*SENA vs. NOS*). Decision of the ECJ of December 11, 2008 (*Kanal 5 and TV 4 vs. STIM*)

criteria in their obligation to approve general tariffs. It also sets out a specific tariff structure depending on the type of the tariff to be approved distinguishing between “effective use tariffs”, “average availability tariffs” and “one use tariffs”.

The First Section of the Copyright Commission, as a copyright tariffs regulator body, is bounded by the legislation that regulates the said criteria when exercising its competence to determine tariffs. In this sense, in its duty to establish reasonable and balanced tariffs it must take into account the mentioned criteria to calculate the economic value of the use of the rights according to the type of tariff.

As regards the methodology to be used by the Commission to set tariffs, it will depend on the file submitted. In any case, methods or principles such as the willing buyer-willing/seller price, the analysis of modelling choice models or the use of proxies may be taken on board to determine tariffs.

Lastly, it can be outlined that together with the “quantum” of the general tariff and its structure the Spanish Copyright Commission Resolutions determining tariffs will also rely on the measures to be adopted by the parties to assure the effectiveness of the tariff, such as the form of payment.

4. SUCCESSFULNESS OF THE EU COPYRIGHT TARIFFS REGULATION IN EUROPE AND SPAIN

It is surely early to get to a clear conclusion on how successful the regulation of copyright tariffs has been in Europe, especially after Directive 2014/26 has come into force. In any case, the EU “acquis” allows Member States to take different approaches regarding the regulation of tariffs, particularly when it comes to the existence or creation of extrajudicial bodies to settle disputes. Visualizing an overall perspective of some European countries and their copyright bodies it is possible to affirm that there is a wide range of them such as:

- a) Administrative bodies that validates “ex-ante” the tariffs approved by collecting societies (Poland).
- b) Administrative bodies entitled to solve disputes on copyright tariffs thorough mediation and arbitration procedures (Spain and Germany), or
- c) Administrative bodies competent to set tariffs (Spain and the UK).
- d) Arbitration and mediation tribunals or bodies. (Every EU member State)

With regard to the Spanish Copyright Commission (Section I) and its new functions, it should be highlighted that they had a good acceptance among the different parties involved in the exploitation of copyrights. Thus, they feel it is good news to have an “ad hoc” body that provides the market with “legal certainty” regarding copyright tariffs.

Nevertheless, the Commission has started to develop its new competences a year and a half ago, so it is almost a brand new regulatory body. During this period, a global report on the tariffs approved in 2016 by the 8 Spanish collecting societies was disclosed by the Commission in December 2016. Also, the first case concerning the determination of tariffs is currently in progress. Finally, the Commission could not intervene until now in other mediation and arbitration procedures because of the lack of agreement of one of the parties involved in the disputes.